From: Rick Stockton
To: Microsoft ATR
Date: 1/23/02 3:48am
Subject: Microsoft Settlement

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Due to the fact that the United States Department Of Justice (DOJ) has published an incorrect address for E-Mail comments at least once, I request that the DOJ send one (or more) return E-Mail replies to me containing (1) confirmation that my E-Mail has been properly received; (2) the responses to all of my comments as required by the Tunney Act; and (3) the date on which my comments and their responses have been published in the Federal Register.

Thank you.

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I object to numerous inadequacies in the Revised Proposed Final Judgement, which, among other failures, provides insufficient relief for injuries suffered by computer buyers and the general public at the hands of Microsoft. As per the Tunney Act, I am providing comments regarding provisions which are present in the document, but are either (a) too unclear; (b) too incomplete; (c) riddled with "loopholes" to benefit the guilty defendant (at the expense of the already victimized Plaintiffs and the consumers they represent); or (d) inadequate from a procedural perspective. These provisions are therefore inadequate to prevent Microsoft from abusing its monopoly power again in the future, and/or inadequate to provide a sufficient remedy for Microsoft's past illegal behavior. My comments also deal with inadequacies of omission (areas in which additional provisions are needed, but the Revised Proposed Final Judgement provides nothing).

I hope that my comments will assist the DOJ in arriving at a proposal which is more fair, effective and reasonable. I would like your to pay particular note to my Third Objection, which provides a very clear and reasonable argument for requiring Microsoft to offer versions of Windows Operating Systems without unwanted "Microsoft Middleware", at reduced prices, to both OEMs and Retail Customers. Retail customers have been victimized with enormously inflated costs via Microsoft's past abuses, but the current Revised Proposed Final Judgement provides no remedy for them.

If I may answer any questions regarding these comments, please feel free to contact me via EMail.

First Objection from Richard Stockton, regarding 'Prohibited Conduct' Part 'A':

The second of 3 numbered items prohibits Microsoft from retaliating against an OEM for "shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System;"

This provision is worded to ALLOW Microsoft retaliation against any OEM who ships Personal Computers with (c) a single non-Microsoft Operating System; or (d) no OEM-installed Operating System at all. In order to be protected from retaliation, the OEM is therefore required to load up all such Personal Computers with multiple bootable Operating Systems. More disk space is consumed, user documentation is made more complex; support costs are raised; and systems design/integration work by the OEM is vastly increased.

The OEM and their customers are both forced to pay for the installation of at least one, and perhaps two, undesired Operating Systems in every Personal Computer. Thus, this provision serves to PROTECT Microsoft's

ill-gotten Operating System monopoly by imposing large, unfair, and totally unwanted costs on the OEMs (and purchasers) of non-Windows computers.

In order to provide adequate remedial value to victimized OEMs, this provision needs to be rewritten to include computers in my categories (c) and (d) (as described in the preceding paragraph).

Second Objection from Richard Stockton, also regarding 'Prohibited Conduct' Part 'A':

With regard to the requirement for Microsoft providing written notice of reasons and 30 days' notice before terminating a Covered OEM's license, the Proposed Judgement says: "Not withstanding the foregoing, Microsoft shall have no obligation to provide such a termination notice and opportunity to cure to any Covered OEM that has received two or more such notices during the term of its Windows Operating System Product license."

After Microsoft has issued two termination notices, it appears that a third notice is not required (even if the reasons provided in the first two notices were invalid, unfair, or "cured"). The definition of a 'Covered OEM' also includes only the 20 largest distributors of Windows Operating System licenses in the entire world. These are large firms, which are likely to need much more than 30 days notice to revise their product lines or distribution channel relationships.

This sentence should be removed (Microsoft should be required to give reasons and reasonable notice for such terminations an unlimited number of times), and the minimum length of time from receipt of the notice of reasons until termination of the agreement should not be less than 90 days.

Third Objection from Richard Stockton, regarding many sections within 'Prohibited Conduct')

Although the Proposed Final Judgement clearly allows OEM's and End Users to remove and/or replace Microsoft "Middleware" Products, nowhere does it require Microsoft to offer a 'stripped-down' versions of Windows Operating Systems at reduced prices. The 'Competitive Impact Statement' states that the DOJ seriously considered a requirement that Microsoft "manufacture and distribute the Windows Operating System without any Microsoft Middleware or corresponding functionality included", but provides no reason why such a requirement was not included.

Therefore, Windows Operating Systems customers (OEM and retail) will be forced to continue subsidizing the Microsoft tactic of destroying competition with Windows-Subsidized "free" Middleware Products, such as Internet Explorer and Windows Media Player. Microsoft has claimed that the dollar value of Internet Explorer source code is in the billions. What ISV can possibly develop a competitive product when Microsoft remains allowed to "cut of their air supply" by shipping "free" Middleware within overpriced Windows Operating Systems? And, why would an OEM go the trouble and expense of working with an ISV to distribute a competitive "Middleware Product" while the Microsoft Product remains effectively "free"?

The Proposed Final Judgement should be changed to specify a reduced price schedule, to benefit all OEMs and Retail customers, for alternate versions of the Windows Operating System which exclude undesired Microsoft "Middleware" Product(s). The current Revised Proposed Final Judgement fails miserably in addressing Microsoft's illegal use of the Operating System monopoly to subsidize the destruction of competitors in Application Middleware markets by "cutting off their air supply".

Fourth Objection from Richard Stockton, regarding failure to require documentation of file formats.

The Proposed Final Judgement presents the disclosure of 'APIs' and 'layers of Communications Protocols' as remedial measures, but fails to include any requirement to document file formats. Any ISV which might attempt to compete in the office document generation marketplace (i.e., word processing, spreadsheets, etc.) must be able to import and export "Microsoft Office" files. The Court found that Microsoft established and maintained a monopoly in this Application Software market by utilizing its Operating System monopoly to destroy competition from Lotus SmartSuite. Many experts within the computer industry consider Microsoft's ill-gotten Office Suite monopoly to be more dominant than its Operating System monopoly.

To provide a remedy for this past abuse, and assist in reconstruction of a competitive marketplace, the content formatting specifications of all such data files must be made available to any ISV who has an interest in developing Software which reads or writes "Microsoft Office" data files, "Windows Media Player" data files, and any other data files utilized by future releases of Microsoft "Middleware" and "Office" Products.

Fifth Objection from Richard Stockton, regarding the presence of a "loophole" allowing Microsoft to withhold vital APIs, documentation, and Communications Protocols.

The paragraph J-1 within section III provides loopholes which make all preceding and following "requirements" to release APIs and related documentation almost totally ineffective. Nearly every "Middleware" Communications Protocol executes within a framework of some authentication and/or authorization criteria, and many Windows APIs implement security features. For example, Windows XP invites its installers to register via Passport. An argument can be made that Passport constitutes a "particular installation or group of installations", and therefore is excluded.

The 'Competitive Impact Statement' claims that "this is a narrow exception, limited to specific end-user implementations" but this text does not appear in the the Revised Proposed Final Judgement.

The clause (a) of this sentence/paragraph provides a loophole, in advance, preventing third party access to vast quantities of information which must be available in order to remedy past illegal behavior of the defendant. The entire clause should be removed and replaced by a section which allows Microsoft to request a waiver from the TC for each specific area of "sensitive" security information which Microsoft desires to conceal. Unless granted a waiver from the TC, Microsoft should be required to release all requested information on a timely basis unless directed not to do so by a government agency as per clause (b).

Sixth Objection from Richard Stockton, regarding the presence of two "loopholes" allowing Microsoft to condition the licenses of APIs, documentation, and Communications Protocols with unreasonable terms.

The paragraph J-2 within section III places expensive, burdensome, and inappropriate requirements on the Software Development entities for whom the Revised Proposed Final Judgement supposedly attempts to provided remedial relief from past Microsoft abuses. As with my Fifth Objection, the 'Competitive Impact Statement', makes a claim that these burdens are limited to only "the narrowest possible scope". But nearly every

"Middleware" Communications Protocol executes within a framework of some authentication and/or authorization criteria, and no such "narrowing" text is present in the Revised Proposed Final Judgement.

Background for Loophole #1: The Findings and evidence in the case, as well as other widely distributed Microsoft documents, indicate that Microsoft considers GNU-Linux to be a serious threat (and perhaps the only remaining viable threat) to its Operating System monopoly. Linux is an Open-Source software project, not controlled by any business entity. Similarly, many of the viable competitors to Internet Explorer depend on the Open-Source Mozilla project for some (and in the specific case of Netscape, nearly all) of the code within their Products.

Loophole #1: In spite of this well-understood situation, clause (c) of the Revised Proposed Final Judgement requires such entities to meet "...reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business". Since these entities are NOT businesses, it seems very unlikely that they would meet "objective standards established by Microsoft". In addition, it is unsound to allow the GUILTY DEFENDANT to establishes the standards by which the already victimized plaintiffs are "judged" to qualify for the remedy. This clause should be replace by a clause which allows Microsoft to request that the TC disqualify a specific Software Development entity from receiving the information for specific reasons provided by Microsoft.

Loophole #2: An even more serious problem exists within clause (d), requiring that the Software Development entity submits its Software Programs to a Microsoft-approved third party test organization "to test for and ensure verification with Microsoft specifications of use of the API or interface...". As a former professional Software Test Analyst, I can assure you that the amount of testing which can be created to fully verify the functionality of a complex API is nearly unlimited. In the Software business, effective test planning and execution must strike a balance between finding significant errors and completing the testing at within reasonable constraints of time and cost. (A vast majority of leading Professors of Computer Science throughout the World would agree with these statements). Microsoft is given a "loophole" to inflict enormous financial costs (and perhaps delays in Software Release) on competing Software Development entities by requiring an amount of testing which is apparently defined by a Microsoft-approved third party. It appears that such a third party is invited to create an arbitrarily comprehensive and lengthy test plan per Microsoft specifications, but that all of resulting test costs are borne by the ISV. This clause should be removed and replaced by clause which allows Microsoft to perform such testing at its own expense (not the ISV's).

Seventh Objection from Richard Stockton, regarding Section IV.D.9.

The scope of this confidentiality agreement appears to be in conflict with IV.D.4.a: Since the latter provision invites third parties to submit complaints concerning Microsoft's compliance, this provision should be changed to allow for the TC to respond to the complaining third party.

Eighth Objection from Richard Stockton, regarding provisions in Section IV.D.4 ("Submissions to the TC").

Lettered item "c" fails to provide any mechanism for assuring that the TC's "proposal for cure" of a meritorious complaint is fully (or even partly) followed by Microsoft. This provision should be expanded to (1) require timely and complete compliance by Microsoft with any "proposal for cure" proposed by the TC; and (2) to provide for appropriate punishment, via Court Action, of Microsoft Corporation and/or its

Officers for failure to comply with any such "proposal for cure".

This leads to my objection to the provision in lettered item "d". The Revised Proposed Final Judgement, after requiring the TC to investigate, analyze, and specify proposals to cure meritorious complaints, specifies that no "work product" may be admitted in any enforcement proceeding before the Court. The TC is required by other Sections to carefully investigate, assess, and resolve any complaints regarding Microsoft behavior. But, the Revised Proposed Final Judgement proposes to remove the possibility of any Court hearing or seeing large amounts of relevant and significant evidence regarding future illegal behavior by Microsoft. By eliminating the use of evidence, testimony, and depositions from the TC in any Court, it appears that the DOJ proposes to put Microsoft (the guilty defendant) beyond the reach of the law.

Ninth Objection from Richard Stockton, regarding the Termination of the Final Judgement.

Microsoft has been found guilty (of violating Laws and previous Court Consent Decrees). Many of the abuses which this document is the proposed remedy occurred more than 5 years ago. But Microsoft continues to engage in behavior which appears to violate laws: During the current comment period, in which Microsoft might be expected to be particularly careful to behave as a "good corporate citizen", the Corporation failed to disclose meeting with aides of the Senate Judiciary Committee to discuss terms of the settlement before a December congressional hearing on the case. Even at this sensitive time, Microsoft behaves as if the Tunney Act doesn't apply to them.

This guilty defendant, with well documented patterns of recurring illegal and abusive behavior, does not deserve such generous expiration terms. Expiration of the Final Judgement should be either (a) at least 10 years into the future; or (b) at the pleasure of the all of the Plaintiffs, in unanimous agreement.

Tenth Objection from Richard Stockton, regarding inclusion of a requirement that Software be "Trademarked" in definitions of "Microsoft Middleware" and "Microsoft Middleware Product".

Definitions J.2 ("Microsoft Middleware") and K. ("Microsoft Middleware Product") require that Software Code meet all of the listed conditions in order to be treated as an instance of the defined software classification. The requirements for code to be Trademarked (J.2 and K.2.b.iii) constitute an inappropriate "loophole" for Microsoft to claim that vast amounts of software is neither "Middleware" nor "Middleware Product", and thereby not covered by any terms within the Proposed Final Judgement. Both of these conditions (J.2 and K.2.b.iii) should be removed.

Eleventh Objection from Richard Stockton, regarding the exclusion of "Windows Explorer" and "Network Neighborhood" from the definitions of J. "Microsoft Middleware" and K. "Microsoft Middleware Product".

Assuring ISV access to Microsoft Networking (as provided by "Windows Explorer", "Network Neighborhood", and their descendents) is an important component in providing a remedy for past Microsoft abuses in the Operating System competitive environment. Microsoft is currently in an ill-gotten monopoly position which allows it to destroy any third party Software which attempts to take part within a network of Windows PCs and Servers (such as SAMBA), by creating new proprietary protocols. The functionality of Client/Server access (and peer-to-peer access) for file sharing should be included within K.2.a.

Twelfth Objection from Richard Stockton, regarding the definition both M. "Non-Microsoft Middleware" and N. "Non-Microsoft Middleware Product" in terms of exposing functionality via published APIs and porting to non-Microsoft Operating Systems.

The functionality of Microsoft Middleware Products such as Windows Media Player have very little to do with exposing "... a range of functionality to ISVs through published APIs", and there is no justification for requiring Non-Microsoft Products to do so. The definition of "Non-Microsoft Middleware" should be changed to include any Non-Microsoft software which (a) provides similar functionality to any of the Microsoft Middleware Products listed definition K.1; or (b) provides functionality analogous to (but not limited to) the more general list of general software product categories in K.2.a, as modified by my Eleventh Objection (above) to also include networking middleware.

Thirteenth Objection from Richard Stockton, regarding the 'million-copies within the previous year' requirement within definition N. "Non-Microsoft Middleware Product".

This distribution volume requirement is excessively large, and should be reduced to 100,000 copies distributed within the previous year. Also, since other items (such as definition C. "Covered OEMs") are worldwide, this requirement should be modified to include software distributions in other countries towards the count of 100,000 copies.

Fourteenth Objection from Richard Stockton, regarding the definition of "Windows Operating System Product".

The final sentence in definition U, "The software code that comprises a Windows Operating System Product shall be determined by Microsoft at its sole discretion" should be removed. With this strongly worded "loophole" present, Microsoft will be able to "bundle" code which provides middleware functionality within the 'Operating System', solely for preventing ISV access to necessary API and Communications Protocol documentation. Without this sentence, Microsoft would still be able to "bundle" code of their choice into the Operating System Product, but ISVs would be provided with at least some protection from abuse of this privilege via the complaint submission and resolution procedures (i.e., Microsoft's discretionary choices would be subject to review by the TC and the Court if complaints are submitted).